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Supreme Court, U.S.
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No. 96-1840

In The

Supreme Court of the United States

October Term, 1996

ROBERT LYNN COCHRAN,

Petitioner,

v.

PLANNED PARENTHOOD ASSOCIATION OF SAN MATEO COUNTY, PLANNED PARENTHOOD ALAMEDA/SAN FRANCISCO, AND NADER OSTOVAR,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of California

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there is an important question for review when the trial court granted and the Court of Appeal upheld a fifteen-foot buffer zone injunction under *Madsen*.

2. Whether there is an important question for review when the trial court considered the promotion of traffic safety as a significant government interest when evaluating an injunction under *Madsen*.

3. Whether there is an important question for review when the Court of Appeal properly conducted an independent examination of the record.

4. Whether there is an important question for review when the injunction upheld by the Court of Appeal enjoined harassing conduct.

5. Whether there is an important question for review when the trial court applied the injunction to petitioner based on substantial evidence in the record about petitioner's participation in unlawful activity.

6. Whether there is an important question for review when petitioner is undisputedly a party without standing to make an overbreadth challenge under *Madsen* and failed to meet the well-established standard for such challenges.

PARTIES

At the time this case was brought, the plaintiffs were 1) Planned Parenthood Association of San Mateo County, California, which owned and operated the clinic at issue in this case, 2) Dr. Nader Ostovar, an obstetrician gynecologist who resided in San Mateo County, and 3) his employer, Planned Parenthood Alameda/San Francisco. The two Planned Parenthood affiliates have now merged and are known as Planned Parenthood Golden Gate.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondent Planned Parenthood respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the California Court of Appeal's decision in this case. That decision is reported at 50 Cal. App. 4th 290 (1996).

INTRODUCTION

The facts of this case have been examined on multiple occasions by three different courts. Evaluating substantially the same facts, a Federal District Judge issued a temporary restraining order in March 1992, a California Superior Court Judge granted a temporary restraining order in September 1993, another California Superior Court Judge granted a preliminary injunction in October 1993 and a permanent injunction in February 1995, and a three-judge appellate panel upheld the buffer zone provision of the permanent injunction in October 1996. Though the terms of these orders varied in minor respects, *all* imposed a buffer zone around the clinic entrances. Petitioner's attempt to convince this Court to reexamine the facts is therefore not only an inappropriate ground for granting certiorari but also unnecessary in light of the careful and repeated analyses conducted below.

Petitioner presents no issue justifying the granting of certiorari. The decision below comports with the standards set forth in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), and reaffirmed in *Schenck v. Pro-Choice Network of New York*, ___ U.S. ___, 117 S.Ct. 855 (1997). In fact, *Madsen* upheld a 36-foot buffer zone, and

Schenck ratified a fifteen-foot zone, both on facts less egregious than those presented here. Thus, no conflict exists with Supreme Court precedent.

Nor are there other legal issues for this Court to review. Petitioner does not contest the standard of review applied by the Court of Appeal. The Court of Appeal properly conducted an independent examination of the record and found sufficient evidence to support the trial court's decision to grant a fifteen-foot buffer zone injunction and to apply it to petitioner as well as the other members of Operation Rescue.

The sum and substance of the petition is an attempt to convince this Court to reweigh the evidence. Where a petition raises only questions of fact, certiorari is not appropriate. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or a misapplication of a properly stated rule of law").

STATEMENT OF THE CASE

Petitioner's statement of the case is erroneous as much for what it omits as for what it misstates. Petitioner does not mention the activities that led the trial court to impose the injunction. The California Court of Appeal's opinion below correctly describes much of the unlawful conduct of petitioner and other members of Operation Rescue leading up to the injunction. Pet. 2a-7a. A few additional facts bear emphasis.

I. UNLAWFUL ACTIVITIES LEADING UP TO THE FIFTEEN-FOOT BUFFER ZONE

Petitioner's activities amounted to more than just "sidewalk counseling." Pet. 2. During the regular Operation Rescue protests at the San Mateo clinic, protesters, *including petitioner,* blocked the narrow sidewalk directly outside the clinic. RT1 8, 57, 61, 111; RT2 170, 184. They rushed up to and yelled at patients, trying to stop patients from entering the clinic. RT1 8. When patients attempted to approach the clinic in cars, the protesters, including petitioner, rushed the drivers and attempted to block the driveway; they tapped on car windows and tried to prevent patients and employees from entering the clinic. RT1 8; RT2 169, 183-184. These activities went on over a period of several years.

In addition to these regular protests, Operation Rescue and petitioner staged four major "rescues" – full-scale blockades of the clinic preventing anyone from entering or leaving – which are well documented in the Court of Appeal's opinion. During these "rescues," patients and staff were imprisoned inside the clinic. RT2 138-39, 140; Ex. 14; RT1 24. In the rescue immediately before the federal court injunction, two protesters feigned an abortion appointment to gain access to the clinic through the rear entrance which opened onto the private parking lot, rushed through the clinic to the front door, and let in fourteen other protesters who were waiting outside. RT1 25-33; Ex. 19A. The protesters occupied the clinic's waiting room, directly blocked the front and all interior doors, and refused to leave. RT1 25-33; Exs. 19A, 21. Meanwhile, an additional forty members of Operation

Rescue, including petitioner, protested outside. RT2 136; RT1 31-35, 155; Ex. 21. The rescue forced the clinic to shut down for the day. RT1 41; Ex. 19A. Some patients were unable to return for abortions because their pregnancies were too far advanced. RT1 41; RT2 136-37; Ex.19A. *Petitioner admitted participating in these blockades.* RT1 151, 155.

II. POST-INJUNCTION PROTESTS AT THE CLINIC

Petitioner's statement of the case also omits to mention that petitioner and other members of Operation Rescue continued their unlawful activities even after the federal and state court injunctions were entered prohibiting them.

The federal injunction issued on March 17, 1992. During the July 17, 1993 blockade, while the injunction was in place, large numbers of protesters, including petitioner, massed outside the clinic, blocking all entrances and delaying normal clinic operations. RT1 45-52, 53-55, 58, 63, 94, 115-116; Exs. 2, 25, 26. This rescue is detailed in the Court of Appeal's opinion. Pet. 6a.

Petitioner repeatedly violated other injunctive provisions throughout the post-injunction period. He continued to approach patients after they had asked to be left alone. RT2 61, 80. As late as July 1994, just months before the trial, petitioner was attempting to block cars on a public street in front of the clinic as they were approaching the clinic. RT 78-79. Petitioner admitted entering the street to talk to patients, forcing cars to stop because he was so close that he seemed to be in danger of being hit.

RT2 79, 126. He also admitted getting "in front of [pedestrians'] line of view" to give them literature. RT2 157-58.

III. THE TRIAL COURT'S DECISION

Petitioner's statement also glosses over the substantial amount of time spent by the trial court reviewing evidence in this case. In addition to holding hearings on the TRO application and preliminary injunction, the court visited the San Mateo clinic in the fall of 1993 and presided over a three-day trial in September 1994.

When he visited the site, Judge Harrington observed that the clinic is set back only very slightly from the street. In fact, the building walls are less than six feet from the street. The waiting room for the clinic fronts on the sidewalk. Palm Avenue has a slight double curve at that point, which the clinic's building follows.

Judge Harrington reinstated the fifteen-foot buffer zone after presiding over the preliminary injunction hearing, visiting the site, and reviewing voluminous declarations describing the problems the protesters had created. He determined that the curve of the sidewalk, and its proximity to the clinic building, necessitated the fifteen-foot zone rather than the three-foot zone imposed in the state court's temporary restraining order. The fact that drivers do not have a clear view around the curve in front of the clinic, in combination with the narrow sidewalk abutting the clinic, creates an extreme traffic hazard with respect to any congregation of

pedestrians in front of the clinic, he concluded in his February 13, 1995 order.[1] Pet. 36a.

In its decision granting the injunction, the trial court found that Operation Rescue organized four rescues between 1988 and 1994, in addition to regular Saturday morning protests, and that petitioner participated in two rescues and in the protests. Pet. 39a-40a. "Plaintiffs presented substantial evidence which suggested that Cochran and Operation Rescue members acted in concert." Pet. 54a. The court concluded that during the course of the rescues and protests, petitioner and other members of Operation Rescue committed numerous tortious acts, including trespassing, false imprisonment, intentional infliction of emotional distress, intentional interference with economic advantage, and interference with the right of privacy guaranteed by Article I, Section 1 of the California Constitution. Pet. 40a-44a.[2] The court found:

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[1] After the preliminary injunction issued, numerous protests by Operation Rescue created just such congregations of pedestrians. *See* discussion *supra* at Sec. II. Petitioner's statement that the only group of pedestrians were Planned Parenthood employees (Pet. 7) is contrary to the facts in the record and the trial court's findings. Pet. 7a (court received evidence of repeated violations of the preliminary injunction by protesters including petitioner).

[2] Petitioner makes much of the fact that the trial court asked respondents to draft the "Statement of Decision Pursuant to CRC 232(C)". There is nothing nefarious about that. Operation Rescue specifically asked the court to issue a statement of decision. The California Rules of Court authorize this procedure, under which the trial court reviews, and the opposing party has the opportunity to submit objections to, the proposed statement. *See* Cal. Rule of Court 232(c).

> Defendants' conduct has effectively forced patients to walk a gauntlet of intimidation to reach the clinic. It has frightened them, reduced them to tears, and caused them severe emotional upset. Patients' heightened stress levels, in turn, have complicated their medical procedures. Patients have required more counseling and, on occasion, more medication before procedures are performed. Others have canceled or delayed their appointments to avoid the protesters. The evidence showed that delaying an abortion procedure increases the likelihood of complications and may force the woman to undergo the more complicated procedure used in second trimester abortions rather than the simpler first trimester procedure.

Pet. 42a.

IV. THE COURT OF APPEAL'S DECISION

After an "independent examination of the entire record," the Court of Appeal affirmed in a published decision the trial court's fifteen-foot buffer zone in front of the clinic because it "serves significant state interests and is compatible with constitutional requirements." Pet. 1a-2a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW FALLS SQUARELY WITHIN THE *MADSEN* RULE

In *Madsen*, 512 U.S. 753, this Court established the test for evaluating the constitutionality of a content-neutral injunction. Finding that a medical clinic buffer-zone injunction is neither content-based nor a prior restraint, this Court declared the test to be whether the challenged provisions of an injunction "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765.

To evaluate the injunction at issue, the *Madsen* Court conducted a two-step analysis. First, it identified five governmental interests, the combination of which was "quite sufficient to justify an appropriately tailored injunction." *Id.* at 768. The state's interests there were: (1) protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy, (2) ensuring the public safety and order, (3) promoting the free flow of traffic on public streets and sidewalks, (4) protecting the property rights of all its citizens, and (5) protecting medical privacy. *Id.* at 767-68.

Second, the Court examined the injunction to determine whether its provisions burdened no more speech than necessary to serve the identified governmental interests. Noting that "some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties," *Madsen*, 512 U.S. at 769-70, the Court held the record supported the trial court's finding that "a 36-foot buffer zone around the clinic entrances and driveway burdens no more speech

than necessary to accomplish the governmental interest at stake." *Id.*

Recently, this Court revisited the issue of buffer zone injunctions in *Schenck v. Pro-Choice Network of Western New York*, ___ U.S. ___, 117 S.Ct. 855 (1997). In *Schenck*, this Court found the facts sufficiently similar to *Madsen* to apply its test and uphold a "fixed" fifteen-foot buffer zone around clinic doorways, driveways, and driveway entrances. *Schenck*, 117 S.Ct. at 868.

The Court of Appeal properly followed this framework and applied the *Madsen* test in upholding a similar "fixed" fifteen-foot buffer zone around the San Mateo clinic. Accordingly, certiorari should be denied.

A. THE RECORD CONTAINED SUFFICIENT EVIDENCE OF INTERFERENCE WITH CLINIC ACCESS AND WITH PEDESTRIAN AND VEHICULAR TRAFFIC

Petitioner first contends there was no evidence of his actual interference with clinic access or with pedestrian or vehicular traffic to support the trial court's findings. Pet. 10-11. Even if true, which it is not, this provides no basis for this Court's review. A need to reweigh evidence cannot support a petition for certiorari. Sup. Ct. R. 10; *see also Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (denying certiorari and *quoting United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.")).

Moreover, contrary to petitioner's claim (Pet. 10), the Court of Appeal's decision contained much more than a

"cryptic reference" to conduct which impeded clinic access and traffic. After stating it had conducted an independent review of the record (Pet. 2a), the Court noted that several blockades temporarily *closed* the clinics. Pet. 4a. In particular, photographs taken at a "rescue" on July 17, 1993, depict "a double row of protesters *blocking* the relocated entrance on the side of the clinic." Pet. 6a (emphasis added). What could be less "cryptic" than this? The Court of Appeal cited additional evidence that conduct on non-blockade days also impeded access:

> Given the physical layout of the building and the site the trial court specifically found that "any congregation of pedestrians in front of the San Mateo Clinic creates an extreme traffic hazard." The [trial] court also noted that there was evidence of actual obstruction of the sidewalk and the driveway, as well as activities which were potentially distracting to passing drivers.

Pet. 10a. The Court also noted the failure of both a fifteen-foot exclusion zone and a prior federal court injunction to ensure unfettered access. *Id.*

Again, contrary to his claim (Pet. 10), petitioner himself engaged in these activities. He violated a temporary restraining order granted by a federal court in March of 1992. RT1 44:12-45:12, 155; Ex. 23. He also participated in "rescues," including the 1993 post-injunction rescue blocking all entrances to the clinic. RT1 47-52, 58, 63, 115-16; Exs. 25, 26. This evidence supports the Court of Appeal's holding that the trial court's findings were proper. Pet. 9a-11a. Because the findings were supported by substantial evidence, there is nothing for this Court to review. *See Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*,

336 U.S. 271, 275 (1949) (refusing to review concurrent findings of fact by two courts below in absence of very obvious and exceptional showing of error).

B. THE COURT OF APPEAL PROPERLY IDENTIFIED SIGNIFICANT GOVERNMENTAL INTERESTS

Petitioner's next claim – that the governmental interests are too broadly defined (Pet. 11-14) – is specious. Citing *Madsen* and *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal. 4th 1009 (1995), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1285 (1997), the Court of Appeal identified the "state interests at issue in this situation" as "(1) protecting the freedom of women to seek lawful services in connection with pregnancy, (2) the delivery of those services with appropriate privacy, (3) preserving public safety and order by ensuring the free flow of vehicular and pedestrian traffic, and (4) preserving property rights." Pet. 8a. This statement employs virtually identical language to that used in *Madsen*, 512 U.S. at 767-68, and adopted by *Williams*, 10 Cal.4th at 1017. Comparable language appears yet again in *Schenck:*

> Given the factual similarity between this case and *Madsen*, we conclude that the governmental interests underlying the injunction in *Madsen* – ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services . . . also underlie the injunction here. . . .

Schenck, 117 S.Ct. at 866.

Petitioner's characterization of the Court of Appeal's consideration of traffic hazards as a "novel legal theory" is equally without merit. Pet. 13. When the trial court made its first visit to the clinic in 1993 in connection with the preliminary injunction, *Madsen* and *Williams* – both cases recognizing the free flow of traffic as a significant governmental interest – had not been decided.[3] *Madsen* and *Williams* had, however, issued at the time the court handed down its decision following trial in 1995, which reiterated the importance to the trial court of its site visit. Pet. 36a. As the Court of Appeal held, the trial court was permitted to take into account its own view of the scene and the impact it perceived that protests would have on pedestrian and vehicular through traffic, especially in light of *Madsen* and *Williams*. Pet. 10a. *See Sierra Club v. Board of Supervisors*, 126 Cal. App. 3d 698, 706 (1981) ("A view by the court is evidence in the case and may alone support the findings.").

In any event, there was substantial evidence in the record that the number of protesters on the sidewalk and street impacted both pedestrian and vehicular traffic. RT1 8; RT1 23:13-22; RT1 47:15-48:19; RT1 60:7-25; Exs. 14, 24-25. This evidence implicated petitioner as well as other protesters. Petitioner admitted that he got "in front of [pedestrians'] line of view" to give them literature. RT1 157:17-158:4. Gabriela Gibson, a Planned Parenthood

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[3] Even in 1993, however, other courts had identified impact on egress and ingress as a legitimate state interest. *See, e.g., Feminist Women's Health Center v. Blythe*, 17 Cal. App. 4th 1543, 1559 (1993) (judgment later vacated); *see also Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 626 (N.D. Cal. 1991).

employee, testified at trial that she saw petitioner "obstruct cars that were approaching the clinic." RT1 78:18-79:19. She also saw him block ingress and egress to the clinic. RT1 74:19-75:7. Thus, evidence other than the trial court's own view supported the court's finding of traffic hazards.

Finally, the record below flatly contradicts petitioner's suggestion that no less restrictive alternatives had been tried or had failed. Pet. 14. To the contrary, a federal injunction was in effect when Operation Rescue organized its fourth blockade, in which petitioner participated. RT1 45-54, 58, 63, 94, 115-116; Exs. 2, 25, 26. This blockade was a clear, admitted violation of the injunction by petitioner. Moreover, petitioner repeatedly violated the injunction on other occasions as well. RT1 58-61, 80. At trial, he admitted to entering the speech-free zone within fifteen feet of the clinic, which the court had specifically prohibited him from doing. RT1 118-119. He obstructed cars on the public street as they were approaching the clinic. RT1 78-79. As mentioned, he blocked ingress to and egress from the clinic (RT1 74:19-75:7) and got "in front of [pedestrians'] line of view" to give them literature. RT1 157:17-158:4. And he openly confessed to having upset some patients by his activities. RT1 158.

Given the repeated and admitted violations of the injunction, the record provided sufficient facts upon which the trial court could rely in shaping a new injunction. Even if this evidence did not exist, the trial court still could have issued the fifteen-foot buffer zone. The failure of a prior, less restrictive order is not a prerequisite, but is rather a factor for a court to consider in

fashioning injunctive relief. *Madsen*, 512 U.S. at 770; *see also Blythe*, 32 Cal. App. 4th at 1664 ("Nothing in *Madsen* mandates that a less restrictive prior injunction is a necessary prerequisite.") Thus, with or without the prior injunction, the trial court acted properly.

II. THE COURT OF APPEAL'S DECISION IMPLICATES NO DUE PROCESS CONCERNS

Petitioner complains he was deprived of due process for two reasons. First, he claims the trial court erroneously considered the promotion of traffic safety as a significant governmental interest because "the possibility of [traffic] hazard[s] was never raised by either party or by the trial court, for whom it was the 'determinative' factor." Pet. 15.

Obviously, the trial court raised the issue. As petitioner notes (Pet. 15), it considered traffic safety the "determinative" factor. Pet. 36a. Whether the parties ever raised the issue of traffic safety is irrelevant. As this Court just recognized, a trial court is entitled to raise governmental interests on its own. *Schenck*, 117 S.Ct. at 866. Indeed this issue – the threat to public safety – is not the type ordinarily raised by a private party:

> [I]n assessing a First Amendment challenge, a court looks not only at the private claims asserted in the complaint, but also inquires into the governmental interests that are protected by the injunction, which may include an interest in public safety and order. . . . Even though the governmental interest in public safety is clearly a valid interest here, as it was in *Madsen*, plaintiffs in neither case pleaded a claim for "threat

> to public safety." Indeed, this would be a strange concept. . . . Thus, the fact that "threat to public safety" is not listed anywhere in respondents' complaint as a claim does not preclude a court from relying on the significant governmental interest in public safety in assessing petitioners' First Amendment argument.

Schenck, 117 S.Ct. at 866.

Petitioner's second argument, that "[t]here was no . . . evidence here" of his interference with vehicular or pedestrian traffic, Pet. 16, is equally erroneous. There *was* evidence of petitioner's interference with the free flow of both vehicular and pedestrian traffic. During the fourth blockade in July 1993 (after the federal injunction had issued), in which petitioner admitted participating (RT1 155), approximately thirty protesters blocked the northern entrance of the clinic's driveway. RT1 47. On other occasions, petitioner was seen "obstruct[ing] cars that were approaching the clinic." RT1 78-79. As to pedestrians, petitioner admitted he got in front of their line of view to give them literature. RT1 157:17-158:4. Thus, there was ample evidence in the record on this issue.

III. THE COURT OF APPEAL'S INDEPENDENT REVIEW OF THE RECORD COMPLIED WITH FIRST AMENDMENT STANDARDS

While admitting that the Court of Appeal made an independent review of the record,[4] petitioner takes issue with its method of examination. Pet. 18. He complains the

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[4] Indeed, the Court of Appeal explained, "because constitutional freedoms are involved, this court must make an independent examination of the entire record." Pet. 2a.

Court of Appeal improperly considered inadmissible evidence and ignored relevant evidence as submitted by petitioner. Pet. 18-19. These evidentiary issues, however, are inappropriate for a petition for certiorari. Sup. Ct. R. 10; *see also Mead*, 465 U.S. at 1043, *quoting Johnston*, 268 U.S. at 227.

Notwithstanding the inappropriate nature of petitioner's complaints, they are easily overcome. Petitioner first argues the Court of Appeal improperly relied on declarations and other evidence presented at the motion for preliminary injunction but not presented at trial. Pet. 18. Whether the Court did so rely is irrelevant. A permanent injunction is to be supported by the "evidence of record." *Dawson v. East Side Union High School Dist.*, 28 Cal. App. 4th 998, 1041 (1994). Furthermore, "injunctive relief rests in the sound discretion of the court . . . to be exercised in accordance with well settled equitable principles and *in light of all the facts and circumstances in the case.*" *Blythe*, 17 Cal. App. 4th at 1554 (upholding permanent buffer zone injunction) (emphasis added).

Petitioner next complains the Court of Appeal ignored his argument that the judgment of injunctive relief was not supported by substantial evidence. Pet. 18. As the Court of Appeal correctly stated in its opinion (Pet. 15a-16a), it need not investigate petitioner's challenge to certain of the trial court's findings because petitioner did not set forth all the relevant evidence in his briefs,[5] *In re Marriage of Fink*, 25 Cal.3d 877, 887-888 (1979)

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[5] Petitioner argues the Court of Appeal wrongly refused to consider the evidence cited in his Opening Brief which he

(rejecting challenge to trial court's findings because appellant failed to cite in brief all material evidence claimed to be insufficient), and because none of the challenged findings are essential to the judgment, *Leonard v. Fallas*, 51 Cal. 2d 649, 653 (1959) (holding that trial court did not err in failing to make certain factual findings because other findings were determinative). Pet. 15a-16a.

In any event, in *Madsen*, another buffer zone case, this Court recognized that "some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Madsen*, 512 U.S. at 769-770 (citing *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 294 (1941). The Court of Appeal's occasional reliance on the trial court's findings is therefore appropriate. It is certainly not grounds for certiorari review.

IV. THE COURT OF APPEAL DID NOT ENJOIN CONSTITUTIONALLY PROTECTED ACTIVITY

Petitioner next argues that the Court of Appeal mistakenly intertwined its analysis of the weekly protests and more occasional massive blockades and, in so doing,

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claimed was insufficient to support the trial court's findings. Pet. 18. He therefore insists that this Court read his Opening Brief to understand his present challenge to the Court of Appeal's decision. Pet. 19. In doing so, however, he essentially asks this Court to determine whether the trial court's findings were supported by substantial evidence, and this is an improper reason to grant certiorari. Sup. Ct. R. 10; *see also Mead*, 465 U.S. at 1043, *quoting Johnston*, 268 U.S. at 227.

enjoined constitutionally protected activity. Pet. 20-22. He claims the Court of Appeal's failure to distinguish between lawful and unlawful conduct conflicts with this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Pet. 20-22. This argument, however, already has been expressly rejected by this Court.[6]

Both this and the California Supreme Court have upheld injunctions against allegedly peaceful picketing. They have not required large scale blockades, similar to the four staged by Operation Rescue at the San Mateo clinic here, to justify a restraint. *See Madsen*, 512 U.S. 753 (upholding 36-foot buffer zone); *Williams*, 10 Cal.4th 1009 (upholding 60-foot speech-free zone where typically six to eight demonstrators picketed on a public sidewalk in front of clinic and engaged in "sidewalk counseling.").

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[6] *Claiborne Hardware*, a case challenging violent boycotts, explains that because the First Amendment does not sanction violence, a state may impose tort liability for business losses caused by violence or threats of violence. However, "when such conduct [violence] occurs in the context of constitutionally protected activity, precision of regulation is demanded." *Claiborne Hardware*, 458 U.S. at 916.

The *Madsen* majority expressly addressed the "precision of regulation" standard announced in *Claiborne Hardware* and declared that its buffer zone standard, which requires an injunction to burden no more speech than necessary, "exemplifies" the "precision of regulation" standard. *Madsen*, 512 U.S. at 767. This Court thus expressly rejected any inconsistency between the two standards.

As the Court of Appeal and trial courts here have properly stated and applied the standard for evaluating buffer zone injunctions, they have also met the "precision of regulation" standard of *Claiborne Hardware*. Consequently, no conflict exists for this Court to review.

Rather, in *Schenck, Madsen* and *Williams,* the petitioners were found to have impeded access, blocked traffic, and "stalked" patients. *Schenck,* 117 S.Ct. at 868; *Madsen,* 512 U.S. at 758-759; *Williams,* 10 Cal.4th at 1020. Nor have the Courts distinguished between the two activities in their analyses. Instead, as the Court of Appeal did here, they focused on whether the injunction burdens no more speech than necessary to serve a significant government interest. *Schenck,* 117 S.Ct. at 868-869; *Madsen,* 512 U.S. at 765; *Williams,* 10 Cal.4th at 1020. For this reason, the Court of Appeal, like the federal and state trial courts before it, did not enjoin constitutionally protected activity.

In making this argument, petitioner also fails to recognize that First Amendment rights are not absolute. The First Amendment does not entitle petitioner to hold Planned Parenthood's staff and patients hostage until they have heard everything petitioner wants to say. *Rowan v. Post Office Dep't,* 397 U.S. 728, 737-38 (1970) ("Nothing in the Constitution compels us to listen to or view any unwanted communication whatever its merit . . . [N]o one has a right to press even 'good' ideas on an unwilling recipient"). The First Amendment does not countenance intimidating, threatening, or harassing conduct. *See, e.g., Van Nuys Pub. Co. v. Thousand Oaks,* 5 Cal.3d 817, 825 (1971), *cert. denied,* 405 U.S. 1042 (1972) (recognizing the state's interest in preventing the forcing of undesired materials on individuals). Where, as here, the injunction was issued in response to the protesters' physical harassment and intimidation of clinic patients and staff, it is impelled by conduct, not by the content of the speech. Under such circumstances, the injunction

must be upheld. *See Schenck*, 117 S.Ct. at 869; *Madsen*, 512 U.S. at 769-70; *Williams*, 10 Cal.4th at 1019-1020.

Petitioner attempts to evade this result by claiming that the intimidation and fear instilled in Planned Parenthood's patients was engendered by the message the protesters conveyed, not by their conduct. Pet. 21-22. This claim already has been rejected outright by this Court. *Madsen*, 512 U.S. at 762-63. Moreover, here, witnesses emphasized at trial that it was the conduct and close proximity of the protesters that caused patients severe emotional upset. RT1 96:12-22, RT2 169, 172, 185. Heightened stress levels, in turn, complicated the medical procedures. CT:1005-1006. As with the speech-free zone affirmed in *Williams*, one purpose of the injunction "was to ameliorate the confrontational tactics of petitioners and to prevent the physical intimidation that resulted in higher stress and anxiety. The target was thus petitioner's *physical* tactics, not their anti-abortion message." *Williams*, 10 Cal.4th at 1020; *see also Schenck*, 117 S.Ct. at 869-870; *Madsen*, 512 U.S. at 762-63.

Both this and the California Supreme Court have observed that targeted picketing of a clinic threatens not only the psychological but also the physical well-being of the patient held "captive" by medical circumstance. *See Madsen*, 512 U.S. at 772; *Williams*, 10 Cal.4th at 1021. By enabling the protesters to station themselves across the narrow street, the Court of Appeal has given them ample opportunity to convey their message without allowing their conduct to intimidate patients and other passersby. This approach adequately accommodates petitioner's First Amendment concerns.

V. THE INJUNCTION AGAINST PETITIONER WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND PRESENTS NO QUESTION FOR REVIEW

In a rehash of an argument that both the trial court and the Court of Appeal properly rejected, petitioner argues that the injunction should not bind him because he had no connection to Operation Rescue. Pet. 22-24. He invites this Court to review a factual record already reviewed by three courts – not a proper ground for certiorari. As all the lower courts found, petitioner's claim has no factual basis. Pet. 7a, 15a, 40a, 54a. Nor does it present a substantial question of law for review, as there is no disagreement on the governing legal standard.

According to the well-established rule, injunctions may be issued against both an organization and persons acting in concert or participation with it. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). Otherwise, organizations would be able to avoid the effect of a restraint by using individuals to circumvent it:

> [A] decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them, or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal Knitwear, 324 U.S. at 14. Sound policy supports this doctrine. An organization may not avoid an injunction's reach by periodically changing the individual representatives engaged in its activities. This settled doctrine of law,

based on a factual determination supported by substantial evidence, does not pose a significant question for review.

The lower courts properly found that petitioner was acting in concert with Operation Rescue so that the injunction should also bind him. Pet. 15a, 54a. According to his own testimony, petitioner contributed money to Operation Rescue, received mailings from Operation Rescue, and regularly attended rallies and rescues (including, as he admits, those at the San Mateo clinic) organized by Operation Rescue. RT1 151, 155. During cross-examination at trial, he admitted his involvement with the organization. RT1 151. Petitioner fails to refute these facts. Hence, there is no dispute that petitioner was a member of Operation Rescue, regularly supported its activities, and attended rescues at the clinic in this case when Operation Rescue was also present. Pet. 15a. He is, therefore, bound by the injunction against Operation Rescue, as the Court of Appeal properly found. *Id.*

There is no requirement that petitioner participate in each and every activity conducted by Operation Rescue to include him in the restraint. To require individualized proof for each separate defendant associated with an organization would be to require separate injunctions for each of them. This has never been the law. *Cf.* Cal. Civ. Code § 3422 (authorizing injunctive relief "to prevent a multiplicity of judicial proceedings").

In addition, the Court of Appeal justifiably upheld the injunction issued against petitioner as a named defendant. Petitioner's reliance on case law concerning the effect of an injunction on *nonparties* associated with an

organization (Pet. 23-24) is therefore irrelevant here. Petitioner is a *named party*. There was ample evidence of his participation in the unlawful activities that necessitated the injunction. He blocked sidewalks, harassed patients, and disrupted traffic, and he participated in two of the rescues that blockaded the clinic for hours at a time. *See supra* at Secs. I-II of the Statement of the Case.

Petitioner's repeated violations of first the federal, and later the state, injunctions also support applying the injunction to him. At a minimum, these violations prove a "cognizable danger of recurrent violation" sufficient to sustain the permanent injunction. *See Madsen*, 512 U.S. at 765 n.3. They demonstrate a real threat that petitioner will resume his previous harassing conduct. There is no cause for this Court to review a finding supported by ample evidence and in accordance with long-standing law. *See Graver Tank & Mfg. Co.*, 336 U.S. at 275.

VI. THE INJUNCTION DOES NOT MEET THE WELL-ESTABLISHED TEST FOR FACIAL OVERBREADTH, AND PETITIONER LACKS STANDING TO CHALLENGE IT

Finally, petitioner challenges the injunction as overbroad because it binds "all persons with actual notice" of its terms. Pet. 24-25. Even if petitioner had standing to make such an argument, he would fail to meet the rigorous standard for an overbreadth attack under settled case law.

As a named party to the injunction, petitioner "lack[s] standing to challenge the portion of the order applying to persons who are not parties." *Madsen*, 512

U.S. at 775. This rule alone is reason enough to refute petitioner's overbreadth argument, as the Court of Appeal found. Pet. 15a. Petitioner's citation to cases involving nonparties are not persuasive. Pet. 24-25. Petitioner unsuccessfully tries to distinguish *Madsen*, but there too plaintiffs attempted a facial challenge to an injunction and failed.

Nor does the injunction meet the strict test for overbreadth. "The overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last resort.' " *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988), *quoting Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Overbreadth law is well-settled. "To prevail on a facial attack the plaintiff must demonstrate that the challenged law either 'could never be applied in a valid manner' or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.' " *New York State Club Ass'n*, 487 U.S. at 11, *quoting City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984).

Because petitioner cannot claim that the injunction could never be applied in a valid manner, he turns to the second type of facial challenge. This too is a very narrow exception. Petitioner will not succeed unless the injunction is "substantially" overbroad, which requires the court to find " 'a realistic danger' " that the injunction itself " 'will significantly compromise recognized First Amendment protections of parties not before the Court.' " *New York State Club Ass'n*, 487 U.S. at 11, *quoting Taxpayers for Vincent*, 466 U.S. at 801. Accordingly, petitioner must demonstrate that there are "a substantial number of

instances" in which the injunction cannot be applied constitutionally. *New York State Club Ass'n*, 487 U.S. at 14. Petitioner fails to identify any nonparties whose constitutional rights would be compromised by the injunction, much less a substantial number of them. The record is devoid of any specific instances of unconstitutional application of the injunction. As in *New York State Club Association*, there is thus no evidence the injunction is substantially overbroad. *See* 487 U.S. at 14.

Moreover, overbreadth doctrine, limited at the outset, "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from pure speech toward conduct." *Broadrick*, 413 U.S. at 615. Petitioner's conduct – trespass on clinic property and harassment of patients and staff – necessitated the injunction and is prohibited by valid laws protecting property and privacy interests. Consequently, because conduct and not pure speech is involved, petitioner must show that the overbreadth is not only real, but substantial as well, judged in relation to the injunction's plainly legitimate sweep. *Id.* Petitioner failed to meet this heightened standard.

Whatever overbreadth may exist may be cured, as in *Madsen*, *New York State Club Association*, and *Broadrick*, through case-by-case analysis of individual situations when, and if, the injunction is ever applied to a nonparty or someone not acting in concert with petitioner and the other defendants. *Madsen*, 512 U.S. at 775-76; *New York State Club Ass'n*, 487 U.S. at 14-15; *Broadrick*, 413 U.S. at 615-16. At that time, nonparties will have ample opportunity to contest the constitutionality of the injunction if, when, and as it is applied to them. Whether a nonparty has notice and should be enjoined is an issue best taken

up in individual cases, not decided from petitioner's viewpoint. *Madsen*, 512 U.S. at 776-77 (Souter, J., concurring). Until that time, the matter is only "an abstract controversy over the use of these words." *Regal Knitwear*, 324 U.S. at 15 (rejecting challenge to provision of injunction applicable to "successors and assigns" when party pressing claim was not a successor or assign). When there is a concrete case before the court, the trial court can properly consider whether the provision violates due process in the manner in which it is applied.[7] Petitioner's overbreadth challenge presents no unsettled issue of law and is not deserving of this Court's review.

Furthermore, to the extent it applies to nonparties, the provision of the injunction comports with due process. The injunction applies only to nonparties *with actual notice*. The remedy for violating an injunction is a motion for contempt. *See* Cal. Code Civ. Proc. § 1209(a)(5). Before contempt can be imposed, the nonparty would have to violate the injunction, Planned Parenthood would have to serve the nonparty with the injunction, and the nonparty would have to violate the injunction again *after* receiving notice. *See* Cal. Code Civ. Proc. § 717.010. Only then, after post-notice violations, could Planned Parenthood move for contempt. To make this motion, Planned Parenthood would need to serve the nonparty once again with the motion and order to show cause. *See* Cal. Code Civ. Proc. § 1212; *In re Meyer*, 131 Cal. App. 41, 44 (1933). Contempt may only be imposed after notice and a hearing. *See* Cal.

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[7] In fact, petitioner himself relies on cases in which the statute/injunction is being challenged as applied to individuals in contempt proceedings. Pet. 23-25.

Code Civ. Proc. § 1217. With three notifications plus opportunity to be heard before the Court, the idea that a nonparty would be deprived of due process is specious.

CONCLUSION

In sum, petitioner presents no unsettled issues of law for this Court's review. The Court of Appeal followed well established precedent of this Court in upholding the injunction. Petitioner's invitation to review a factual record already reviewed by three lower courts should be declined. Certiorari is not appropriate here.

Respectfully submitted,
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